

Being and Owning

The Body, Bodily Material, and the Law

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Introduction

I. The Property of No One

Common law systems have inherited from the seventeenth century the rule that there is 'no property in the human body'. This rule can be traced back as far as Coke's *Institutes of the Laws of England* in 1644. The rule, as it was stated by Coke, required that: 'the buriall of the *Cadaver* ... is *nullius in bonis* [the property of no one], and belongs to Ecclesiastical cognizance'.¹ As Peter Skegg explains, at that time corpses were normally buried in consecrated ground. Once there, they were protected by ecclesiastical law.² The interpretation of the rule was that the 'cognizance' of ecclesiastical courts was at the exclusion of jurisdiction of the civil courts. This implication was not a necessary one. Monuments on consecrated ground, for instance, were both subject to the ecclesiastical jurisdiction and protected by civil actions.³

It was not until 1882 that the 'no property rule' was affirmed in a recorded English judgment.⁴ In *Williams v Williams*, the deceased had provided in his will that his body be 'given' to his 'friend Miss Eliza Williams, to be dealt with by her in such a manner as [he had] directed ... in a private letter'.⁵ The will also directed the executors of his estate to reimburse Miss Williams the expenses incurred from carrying out the instructions. The executors refused to pay Miss Williams the £321 of expenses that she incurred and Miss Williams brought an action against the executors. Her claim was unsuccessful. The

¹ E Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (London: 1644) 203; PDG Skegg, 'Human Corpses, Medical Specimens and the Law of Property' (1975) 4 *Anglo-Am L Rev* 412; PDG Skegg, 'The "No Property" Rule and Rights Relating to Dead Bodies' (1997) 5 *Tort L Rev* 222, 222–9.

² PDG Skegg, 'Human Corpses, Medical Specimens and the Law of Property' (n 1) 412.

³ PDG Skegg, 'Human Corpses, Medical Specimens and the Law of Property' (n 1) 412.

⁴ *Williams v Williams* (1882) 20 Ch D 659; PDG Skegg, 'Human Corpses, Medical Specimens and the Law of Property' (n 1) 415.

⁵ PDG Skegg, 'Human Corpses, Medical Specimens and the Law of Property' (n 1) 415.

Court of Chancery held that since *there is no property in the dead body of a human being*, the deceased was unable to dispose of, or make directions as to, his dead body through his will.

Over the three and a half centuries since Coke's *Institutes*, several claims based on property rights in the human body and its parts have failed on the basis that the human body is not the subject of property.⁶ Yet, recently courts have developed a series of exceptions to the 'no property rule'. For example, recent decisions have recognized, in contrast to the decision in *Williams v Williams*, that a deceased person is able to dispose of his stored semen by will,⁷ that bodily material can be directed through the application of intestacy law as items of property,⁸ and that a widow may obtain the right to possess the body and bodily material of the deceased as items of property.⁹

These recent exceptions to the 'no property rule' reflect the fact that the human body is no longer always destined for consecrated ground. The body and bodily material can be retained, stored, and used for a wide range of purposes. Items of bodily material have become valuable things that people claim the right to possess, use, and control. What has so far remained constant is the way in which we are embodied; our bodies enable our existence, our experiences and our engagement with the world. It is in this way that our bodies have always been valuable things. The use and storage of bodily material is a context where these two values – one constant and one newly emerging – converge.

The current law is therefore evenly poised between a general rule, which states that there is no property in the human body or its parts, and a series of expanding exceptions to the general 'no property rule'. The application of the 'no property rule' leaves a void in the law by only negating the recognition of property rights in bodily material without positing an alternative right in bodily material. Moreover, the expanding exceptions to the general rule leave the scope of the 'no property rule' uncertain. As a result, the legal status of bodily material is undetermined and unclear.

⁶ *Dobson and another v North Tyneside Health Authority and another* [1996] 4 All ER 474; *Re: Organ Retention Group Litigation* [2005] QB 506; *Greenberg v Miami Children's Hospital* 264 F Supp 2d 1064, 1066 (SD Fla 2003); *Moore v Regents of the University of California* 793 P 2d 479 (Cal 1990); *Washington University v Catalona* 437 F Supp 2d 985 (ED Mo 2006).

⁷ *Hecht v Superior Court of Los Angeles County* 20 Cal Rptr 2d 275 (Cal Ct App 1993).

⁸ *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118.

⁹ *Jocelyn Edwards; Re the Estate of the Late Mark Edwards* [2011] NSWSC 478.

II. Three Main Inquiries

The aim of this book is to determine the appropriate legal status of bodily material. In doing so, I provide a way of filling the void that is left by the ‘no property rule’. The analysis is shaped by three main inquiries or themes that develop throughout the chapters. The first inquiry concerns the distinction between ownership as a functional relationship between a person and thing, and the legal relationships between a rights-holder and duty-bearer that are constructed to protect ownership relationships. According to this distinction, property rights have two dimensions. Property rights ground the ability for a person to use or control an object or resource whilst also providing a particular configuration of legal rights and duties that protect the relationship of use or control over the object or resource. The ‘no property rule’ negates both these dimensions. It significantly limits the ability for a person to assert the right to possess, use, or control an item of bodily material, and it prevents property law from protecting whatever interest a person may nonetheless have in the bodily material.

To the extent that this book aims to fill some of the void left by the ‘no property rule’, we can anticipate that such a task is twofold. First, it requires us to identify when, and under what circumstances, a person ought to be able to possess, use, control, transfer, or sell bodily material. Second, it requires us to identify what it means for an ‘incident of ownership’ or ‘entitlement’ in an object or resource to give rise to a property right, and then assess whether property law represents the most appropriate branch of law to protect the ownership relationship between a person and an item of bodily material.

The second inquiry concerns an ambiguity in the body. We are all a complex combination of things; genes expressing, cells dividing, neurons firing, and muscles twitching. We are also more than just a complex combination of things. We are things that attract moral attention. The body is nonetheless the location of both a person’s thing-ness (physical existence) and the focal point of our duties of respect for that person. The body is ambiguous insofar as it is capable of more than one meaning: it can be both an *object* (a complex combination of things) and can be the *subject* (that which attracts moral attention). When bodily material is separated from the body the question becomes whether, and to what extent, the bodily material ought to continue to attract the duties of respect that are ordinarily directed towards the person and their body.

If bodily material is only ever a mere object, then the way in which we ought to fill the void left by the ‘no property rule’ is relatively straight-forward. We

ought to allocate and distribute bodily material in the same way that we allocate and distribute other material resources. This may include compulsory redistribution of resources to address social needs and commercial exchanges of resources as an efficient means of resource allocation. Furthermore, if bodily material is only ever a mere object, then the further implication is that the law ought to govern the use and possession of bodily material in the same way it governs the use and possession of other material resources. That is, through the application of property law. This book aims to resist these implications.

The third inquiry concerns a distinction between different sets, or spheres, of value. Whilst we may value a wide range of things, we do not value all things using a single metric or mode of valuation. For instance, we all value our own personal wealth and material goods and we all value our personal relationships and our own reputation. We nonetheless value these things using different modes of valuation. Our bank balance and our friendships clearly belong to different spheres of value. These different spheres of value mirror categories within the law. We enjoy a range of legal rights, such as the right to possess items of property, the right to privacy, and the right to bodily integrity. Our rights with regards to our property enable a set of preferences and choices that another person is able to exercise. The same cannot be said of our rights to privacy or bodily integrity. Such rights protect a set of preferences and choices that can only be exercised by us. I will suggest that there is an underlying distinction that is able to differentiate between spheres of value and categories of legal rights. The distinction suggests that our personal wealth and items of property have a substitutional value that is contingent to any particular person. Our personal relationships, privacy, and bodily integrity, in comparison, have value in their own right and are necessarily associated with us.

In circumstances where bodily material is a mere object, we may value an item of bodily material in the same way that we value our personal wealth or our items of property. In other circumstances, the use and storage of bodily material might engage values that are more akin to the way that we value personal relationships, our privacy, or the use and control over our (living and attached) body. These different modes of valuation, and ultimately different legal categories, follow from the ambiguity in the body and bodily material. What raises concern is when these different values are treated as if they are somehow the same; to reduce the value of personal relationship to a monetary value, or to reduce our bodies to a 'repository' of financially valuable chattels, is to *denigrate* our friendships and our bodies. As we shall see, this concern provides the underlying motivation for maintaining a distinction that is able to differentiate between values, preferences, or choices that

are contingently associated with the rights-holder; and values, preferences, or choices that are necessarily associated with the rights-holder.

III. Chapter Synopses

Allow me to briefly state the main arguments in each of the following chapters. In chapter one, I differentiate ownership from property. Ownership is a series or spectrum of functional relationships between a person and an object or resource. To this end, all items of bodily material are capable of being owned since all items of bodily material can, in functional terms, be possessed, used, managed, transferred, sold, and so on. Since each 'incident of ownership' represents a functionally distinct relationship between a person and an object or resource, the task of justifying or explaining why a person ought to be able to exercise an incident of ownership or 'entitlement' in an object or resource will vary depending on the incident or entitlement in question. With regards to items of bodily material, two main types of justifications arise: either entitlements in bodily material can be justified with reference to the 'natural' or 'pre-social' rights of the person or with reference to the state of affairs that follow from the exercise of the entitlements.

Ownership, however, is not a legal concept. The recognition of an incident of ownership or entitlement in bodily material does not necessitate the application of property law. This is because property law represents a particular configuration of rights and duties that protects an ownership relationship. Moreover, there are other branches of law that are able to protect the possession, use, or control of an object or resource. There is a choice, therefore, as to which branch of law ought to govern the possession and use of bodily material.

Chapter two aims to identify when, and under what circumstances, a person ought to be able to possess, control, or use bodily material. Whilst we can provide explanations with relative ease as to why each person has exclusive rights of use and control over their own (living and attached) body, such explanations appear to be unable to extend to bodily material that is separated from the body or extend to the posthumous body and its parts. I assess three possible explanations for why a person ought to retain entitlements in bodily material: the 'prior embodiment principle', the Lockean 'work or skill rule', and the Hegelian 'nexus of dual relations'. I suggest that, from these three explanations, only the Hegelian account is able to justify entitlements in bodily material. The intuitive 'prior embodiment principle' is inapplicable since someone's prior relationship with the body cannot be extended to

explain or justify their current assertion of rights in the bodily material. The Lockean ‘work or skill rule’ is only partially able to bridge the gap between a person and an object or resource by identifying how a person’s intentional actions can provide a new attribute in the object or resource. The Hegelian ‘nexus of dual relations’ is able to fully bridge the gap between subject and object by connecting the object with both a person’s intentional actions and an indented state of affairs.

I then consider a fourth explanation for why a person ought to be able to own bodily material. The fourth explanation, following Merleau-Ponty, suggests that our bodies are the site or location of our subjectivity (that which attracts moral duties). Bodily material, in some circumstances, may continue to be the location of our being or subjectivity. The comparison between this explanation and the previous three explanations in this chapter invites an important contrast. The contrast is between two views of the body, as either arbitrarily and contingently associated with the subject, or as necessary and constitutive the subject. How we address the tension between the interests that individuals have in their own bodily material (or the body of a deceased loved-one) and the societal interest in using bodily material for broader healthcare aims is largely informed by whether we view the body as contingently associated or necessarily associated with the person.

Chapter three concerns the sale of bodily material. This chapter advances three main arguments. First, I argue that it is not possible to justify the right to profit from the transfer or relinquishment of bodily material with reference to the qualities or attributes of the person. The right to profit, simply put, cannot be a ‘natural’ or ‘pre-social’ right. This is because the content of the right to profit is connected to a series of considerations or factors that are external to the rights-holder and the object or resource. Such considerations are of a different order of considerations than those that form the ‘natural’ or ‘pre-social’ rights of the person. Second, the right to profit may be justified with reference to the state of affairs that follow from permitting people to exchange bodily material for a financial benefit, such as the increased availability of bodily material for socially valuable enterprises. This justification of the right to profit is valid on the condition that the financial benefit is able to provide reasons for action that motivate decisions to transfer or relinquish bodily material. I will suggest that there are instances where this condition may not be satisfied. Given that we may value some things in their own right, the third argument in chapter three raises the concern that the opportunity to financially benefit from the relinquishment or transfer of bodily material may be the basis of pressure to reduce or denigrate something that has value in its own right into something that has substitutional or equivalent value. The denigration of the bodily material, I suggest, indicates that the ability of

a person to determine what physical things constitute their subjectivity may be vitiated.

The second half of the book focuses on questions of law and legal theory. Chapter four identifies two conceptual features of property rights. That is, two sets of the social and moral assumptions that underlie the legal structure of property rights. Property rights, I argue, are exclusive rights. We have an interest in the use of various different things, objects, or resources. This interest is best characterized as an interest in an open-ended set of activities. Property law protects this interest by placing the thing itself as the focal point of the legal relationship between a rights-holder and duty-bearer. The rights-holder then has the ability to exclude all others from the object or resource as a way of protecting and enabling an open-ended set of activities. The right to bodily integrity is conceptually akin to property rights in this regard. The right to bodily integrity is an exclusive right as it enables the rights-holder to exclude all others from their body as way of providing for the rights-holder full authority over an open-ended set of activities with regards to their body.

The second conceptual feature of property rights concerns the relationship between the rights-holder and the preferences and choices that the right enables. Property rights are contingent rights: they enable preferences and choices that can exist independently of the rights-holder. We can assess whether a right is a contingent right by applying two criteria. These criteria question whether there are normative consequences (beyond mere allocative consequences) to a change in rights-holder, and question whether another person can stand in the same position as the initial rights-holder with regards to the object or resource. The right to bodily integrity, in contrast to property rights, is a non-contingent right; it protects preferences and choices that can only be exercised by the rights-holder. We can understand why the right to bodily integrity is a non-contingent right either in terms of the close and immediate connection between a person's subjectivity and their body or in terms of the body being the site or location of a person's subjectivity.

Chapter five explores property law as a structure of legal rights and duties. This chapter focuses on five 'structural' or 'doctrinal' features of property rights-based actions, how these structural features follow from the conceptual features identified in the previous chapter, and how these structural features have shaped the way in which the law on the use and storage of bodily material has developed. I suggest that property rights, as conceptually exclusive rights, are rights that are exercisable against an open set of persons, protect the original and derivative dimension of ownership, and impose primary duties of non-interference. This structure of an 'exclusionary boundary' around the object or resource is able to explain why exceptions to the 'no

property rule' have been formulated. This exclusionary structure is the same structure applied in legal actions that protect the right to bodily integrity.

As conceptually contingent rights, property rights are presumptively transferable. Moreover, the infringement of property rights are addressed through the imposition of corrective remedial duties that aim to correct or restore the misallocation of entitlements through the award of 'special' damages. The right to bodily integrity, as with other 'personal rights', differs in this regard. Such rights are inalienable and infringements are addressed through the imposition of distributive remedial duties that allocate benefits and burdens in accordance with a criterion of merit through the award of 'general damages'. To the extent that some interests in bodily material may represent a set of preferences and choices that can only be exercised by particular rights-holders, a conceptual and structural inconsistency emerges between property rights and some of the interests that may arise in the use and storage of bodily material.

Chapter six then formulates a recommendation as to how the law ought to govern the use and storage of bodily material. I suggest here that the rights that arise in bodily material are best conceptualized as exclusive rights. However, because of the 'no property rule', the law has so far relied upon a 'governance' rather than an 'exclusion' strategy. The appropriate legal response to the use and storage of bodily material varies, and depends on whether a right is contingently or necessarily associated with the rights-holder. In circumstances where bodily material retains a functional unity with the body of the progenitor (the person from whom the bodily material originates from) or remains as the medium of social experience, the rights that arise in such items of bodily material are exclusive and non-contingent rights. In all other circumstances, rights in bodily material ought to be conceptualized as exclusive and contingent rights.

What complicates the structure of the appropriate legal response to the use and storage of bodily material is that the structure of rights varies between circumstances. An analogy with the right to privacy provides a way forward. The right to privacy is an exclusive but non-contingent right that governs an ambiguous subject matter. Duties of confidentiality with regards to personal information represent a re-adjusted exclusionary boundary that is able to account for the variation in circumstances where information that pertains to an individual does or does not engage a privacy interest. Where a progenitor retains entitlements in bodily material or when family members obtain entitlements in the body of a deceased person, the most appropriate legal structure to protect such entitlements is the same legal structure as the common law right to privacy (facilitated through duties of confidentiality). In all other circumstances, where the bodily material represents a mere material

resource, the most appropriate legal structure is the structure of property rights. This dualist approach to the structure of the law follows from an underlying contention throughout the discussion: that although we are a complex combination of things, some things—even when physically separate from us—constitute our being.

IV. Parameters

Finally, allow me to clarify the parameters of this overall inquiry. The inquiry is concerned with the law that governs ‘bodily material’. This includes any part of the human body, from the smallest cell to the largest organ, that has been detached or extracted from the body, as well as the body and bodily material of deceased persons. My focus will be on the use and storage of this material in the context of the provision of healthcare, where there is potential for therapeutic, diagnostic, scientific, and educational application of the material (to the exclusion of the forensic or artistic application of the material). I will also narrow our focus to the material dimension of separated bodily material (to the exclusion of the informational dimension of the material). The discussion here roams between common law jurisdictions in an attempt to survey landmark cases on the use and storage of bodily material. However, the primary jurisdictional reference point remains the laws of England and Wales, unless otherwise stated.